

E6APBARH

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

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3 UNITED STATES OF AMERICA,

4 v.

07 CR 862 (AKH)

5 DANIEL BARERRA-BARRERA,

6 Defendant.

7 -----x

8 New York, N.Y.

9 June 10, 2014

4:07 p.m.

10 Before:

11 HON. ALVIN K. HELLERSTEIN,

12 District Judge

13
14 APPEARANCES

15 PREET BHARARA,

16 United States Attorney for the
Southern District of New York

17 BENJAMIN NAFTALIS

JENNA DABBS

18 Assistant United States Attorney

19 RUBEN OLIVA

20 Attorney for Defendant

21 WALTER MACK

Curcio Counsel for Defendant

22 ALSO PRESENT: ALEX WIEDER, Spanish Interpreter
23 SELMA MARKS, Spanish Interpreter

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(In open court)

(Case called)

MR. NAFTALIS: Good afternoon, your Honor. Benjamin Naftalis, and Jenna Dabbs for the government.

THE COURT: Good afternoon.

MR. OLIVA: Good afternoon. Ruben Oliva on behalf of Daniel Barerra-Barrera, also with the interpreter, and also is Mr. Mack, the Curcio counsel that was appointed by your Honor.

THE COURT: Okay. Mr. Mack, would you kindly report.

MR. MACK: Yes, your Honor. I have had the opportunity to visit with the defendant, and I went through the government's letter of May 23rd, spent fairly significant time with Mr. Barerra-Barrera, also mentioned what this hearing could consist of, and I also mentioned some of the New York State rules, as well, that could apply here.

And he at least told me that he understood what I was describing to him and the risks to him and the concerns that the Court would likely have, and he appreciated my efforts, but had no further questions and intended to proceed with Mr. Oliva, if the Court would permit.

THE COURT: Thank you, Mr. Mack.

MR. MACK: Yes, your Honor.

THE COURT: Mr. Barerra-Barrera, I'm required to --

THE DEFENDANT: Good afternoon, your Honor.

THE COURT: Good afternoon. I'm required to ask you a

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1 number of questions. You are to answer those questions.
2 You'll be under oath; so you must tell me the truth, the whole
3 truth and nothing but the truth. At the end of these answers,
4 I will be in a position to make a judgment as to whether or not
5 Mr. Oliva can act as your counsel or not.

6 I should begin by saying that the right to counsel is
7 critical, it's a fundamental right in the United States, and
8 provided in the Sixth Amendment in the United States
9 Constitution. An attorney who is honored by having the ability
10 to represent people accused of a crime are required to give
11 independent and zealous services. That is, they must do the
12 very best they can, as hard as they can, to represent the
13 interests of their client.

14 In cases of conflict, where a lawyer represents, for
15 example, other people, the judge is required to examine the
16 lawyer and the client to make sure that the advice that's given
17 can be in the best interest of the client, and to the extent
18 that there are any questions that the client is aware of and is
19 making an intelligent choice. That's why I'm asking you these
20 questions. Do you understand?

21 THE DEFENDANT: Yes, your Honor. I understand.

22 THE COURT: All right.

23 (Defendant sworn)

24 THE DEPUTY CLERK: Please state your full name for the
25 record.

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1 THE DEFENDANT: Daniel Barerra-Barrera.

2 THE COURT: How old are you, sir?

3 THE DEFENDANT: 45 years old.

4 THE COURT: Are you single or married?

5 THE DEFENDANT: Single.

6 THE COURT: Do you have any dependents, children?

7 THE DEFENDANT: Yes. Yes, your Honor.

8 THE COURT: How many?

9 THE DEFENDANT: Nine.

10 THE COURT: With how many women?

11 THE DEFENDANT: With three.

12 THE COURT: Were you married to any of them?

13 THE DEFENDANT: No. I live with her, but we never got
14 married.

15 THE COURT: Where were you born?

16 THE DEFENDANT: Bogota, Colombia.

17 THE COURT: Did you attend school in Colombia?

18 THE DEFENDANT: No, your Honor.

19 THE COURT: No grade school?

20 THE DEFENDANT: No, your Honor.

21 THE COURT: Were you educated at home?

22 THE DEFENDANT: We lived in the country, and there was
23 no school.

24 THE COURT: Do you know how to read and write?

25 THE DEFENDANT: So-so.

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1 THE COURT: Can you read a newspaper in Spanish, of
2 course?

3 THE DEFENDANT: Yes, in Spanish.

4 THE COURT: Can you read the headlines?

5 THE DEFENDANT: Yes.

6 THE COURT: Can you read the stories under the
7 headlines?

8 THE DEFENDANT: Yes.

9 THE COURT: Do you ever read magazines?

10 THE DEFENDANT: Yes, I read them.

11 THE COURT: Do you ever read books?

12 THE DEFENDANT: I have read many books here.

13 THE COURT: So we can safely say that you know how to
14 read?

15 THE DEFENDANT: Yes.

16 THE COURT: Can you read in any language other than
17 Spanish?

18 THE DEFENDANT: No, only Spanish.

19 THE COURT: Can you write Spanish?

20 THE DEFENDANT: Yes.

21 THE COURT: Can you write a letter?

22 THE DEFENDANT: Yes.

23 THE COURT: So you can read and write Spanish?

24 THE DEFENDANT: Yes.

25 THE COURT: And we have an interpreter to help you

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1 translate from English to Spanish and Spanish to English. As
2 you stand here today, is your mind clear?

3 THE DEFENDANT: Yes, sir. Yes, your Honor.

4 THE COURT: Are you taking any medicines that would
5 blur your thinking?

6 THE DEFENDANT: No, your Honor.

7 THE COURT: Have you taken drugs or alcohol that would
8 blur your thinking?

9 THE DEFENDANT: No, your Honor.

10 THE COURT: Is there anything that interferes with
11 your ability to understand what's happening here today?

12 THE DEFENDANT: No. I understand very well, your
13 Honor.

14 THE COURT: Now, do you understand that an indictment
15 has been filed against you in this court?

16 THE DEFENDANT: Yes, your Honor.

17 THE COURT: Have you had an opportunity to read the
18 indictment?

19 THE DEFENDANT: Yes, your Honor.

20 THE COURT: Have you discussed it with Mr. Oliva?

21 THE DEFENDANT: Yes, your Honor.

22 THE COURT: Have you told him everything that you know
23 of with regard to the indictment?

24 THE DEFENDANT: Yes, your Honor.

25 THE COURT: Are you satisfied with Mr. Oliva's

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1 services?

2 THE DEFENDANT: Satisfied, your Honor.

3 THE COURT: Would you like me to read the indictment
4 again to you?

5 THE DEFENDANT: No, your Honor.

6 THE COURT: You feel you know it, right? Do you know
7 that you feel you know the indictment? I'm not asking you to
8 plead guilty or not.

9 THE DEFENDANT: Yes.

10 THE COURT: Do you -- I just want to know that you
11 fairly believe that you understand the allegations contained in
12 the indictment.

13 THE DEFENDANT: I understand them very well, your
14 Honor.

15 THE COURT: Now, the government wrote a letter to me
16 of May 23, 2014. I wonder if you might put it in front of him,
17 Mr. Oliva. Have you read that letter?

18 THE DEFENDANT: Yes, your Honor, I read it.

19 THE COURT: Have you discussed this letter with
20 Mr. Oliva?

21 THE DEFENDANT: Yes, your Honor.

22 THE COURT: Now, do you understand that Mr. Oliva,
23 besides representing you, represents some other individuals,
24 each of whom is mentioned in the government's letter and each
25 of whom might possibly testify against you if this case went to

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1 trial?

2 It's a complicated question. Let me break it down.
3 The letter makes reference to a number of individuals. Did you
4 understand that?

5 THE DEFENDANT: Yes, your Honor.

6 THE COURT: For example, [A]?

7 THE DEFENDANT: Yes, your Honor.

8 THE COURT: [B]?

9 THE DEFENDANT: Yes, your Honor.

10 THE COURT: [C]?

11 THE DEFENDANT: Yes, your Honor.

12 THE COURT: [D]?

13 THE DEFENDANT: Yes, your Honor.

14 THE COURT: [E]?

15 THE DEFENDANT: Yes, your Honor.

16 THE COURT: [F]?

17 THE DEFENDANT: Yes, your Honor.

18 THE COURT: Do you understand that your lawyer,
19 Mr. Oliva, represents each one of these individuals?

20 THE DEFENDANT: Yes, I understand, your Honor.

21 THE COURT: Does this bother you at all?

22 THE DEFENDANT: No, it's not an impediment at all,
23 your Honor.

24 THE COURT: A lawyer is required to give independent
25 advice to each of his clients. That is to say, the lawyer must

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1 tell the client what is in the best interest of the client
2 according to the best judgment the lawyer has.

3 Do you worry that if your lawyer has the same
4 obligation to someone else, the lawyer might not be able to
5 give you independent advice that is best suited for yourself?

6 THE DEFENDANT: I understand very well, your Honor,
7 and I feel very well with my attorney.

8 THE COURT: I understand that. Your attorney is a
9 fine attorney, and you know him. And the law requires me to
10 respect the choice of an intelligent individual, such as you,
11 but it's a matter of logical understanding that two people in
12 the same situation might have different interests, and the
13 lawyer has to serve each interest. How can a lawyer do that?
14 Do you ask yourself that question?

15 THE DEFENDANT: In the case that I would go to trial,
16 the other clients would not prejudice me because I have never
17 had any business dealings with them, your Honor.

18 THE COURT: But you don't know what they will say, do
19 you?

20 THE DEFENDANT: But it's not an impediment at all,
21 your Honor.

22 THE COURT: For example, they may something that they
23 think is true, but which you think is not true, and they may
24 see some interest of yours that they wish to compromise in some
25 fashion. That's possible. Are you concerned about it?

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1 THE DEFENDANT: No, your Honor. I'm fully certain of
2 what I'm saying.

3 THE COURT: Another possible conflict -- I'm not
4 mentioning this, Mr. Barerra-Barrera, to criticize your lawyer.
5 I'm saying this because it's my obligation to discuss with you
6 possible compromises in loyalty. I'm not saying they will
7 exist. I'm only saying they're possible, and I'm required to
8 bring these to your attention. Please don't feel I'm insulting
9 your intelligence or criticizing Mr. Oliva in any way because
10 I'm not. All right?

11 THE DEFENDANT: I understand perfectly, your Honor.

12 THE COURT: Another thing, if one of Mr. Oliva's
13 clients wishes to plead guilty, the government will often
14 require that individual to give a full statement of what that
15 individual did. The government requires that sometimes to try
16 to obtain cooperation and obtain information that would be
17 useful against other defendants in the case.

18 A lawyer representing both, both individuals,
19 sometimes has to experience difficulties in how much can be
20 said, how much will benefit one client and not injure another,
21 how much will benefit the other and not injure the first one.
22 And there are very delicate issues that have to be understood
23 by the lawyer, and they may not always be able to do it
24 perfectly. Does that bother you?

25 THE DEFENDANT: No, your Honor. It doesn't bother me.

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1 THE COURT: Now, it's not really possible for me to
2 foresee all the possibilities of conflict in Mr. Oliva's
3 representations. I've tried to point out some that I could
4 imagine. Can you think of any others?

5 THE DEFENDANT: No.

6 THE COURT: Do you understand that in every criminal
7 case each defendant is entitled to assistance of counsel whose
8 loyalty to him is undivided, who is not subject to any factor
9 that might in any way intrude upon his loyalty to your
10 interests? In other words, do you understand that you are
11 entitled to an attorney who has only your interest in mind and
12 not anyone else's? Do you understand that?

13 THE DEFENDANT: I understand, your Honor.

14 THE COURT: Have you been threatened in any way
15 regarding your choice of a lawyer?

16 THE DEFENDANT: No, your Honor.

17 THE COURT: Have you been put in any fear about
18 choosing a lawyer?

19 THE DEFENDANT: No, your Honor.

20 THE COURT: Has anyone promised you anything with
21 regard to your choice of a lawyer?

22 THE DEFENDANT: No, your Honor.

23 THE COURT: Has anyone told you what you must do in
24 this case?

25 THE DEFENDANT: No, your Honor.

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1 THE COURT: Before you engaged Mr. Oliva, did you have
2 conversations with any other lawyers about engaging some other
3 lawyer?

4 THE DEFENDANT: I listened to several, but I chose
5 Dr. Oliva.

6 THE COURT: Have you had the opportunity of
7 discussions with Mr. Mack? Have you asked Mr. Mack every
8 question that came to your mind?

9 THE DEFENDANT: All of the questions, your Honor.

10 THE COURT: Are you satisfied that you have explored
11 the possibility of injury to you, because of a conflict, fully?

12 THE DEFENDANT: I feel satisfied.

13 THE COURT: After considering everything I said to you
14 today about the ways in which Mr. Oliva's representation of
15 other individuals might effect his defense of you, do you
16 believe that it is in your best interest to continue with
17 Mr. Oliva as your attorney?

18 THE DEFENDANT: Your Honor, I will continue with
19 Dr. Oliva.

20 THE COURT: I'm sorry?

21 THE DEFENDANT: Your Honor, I will continue with
22 Dr. Oliva.

23 THE COURT: Is that your wish?

24 THE DEFENDANT: Yes, your Honor.

25 THE COURT: Do you understand that by choosing to

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1 continue with Mr. Oliva as your attorney, you waive your right
2 to be represented by an attorney who has no other interest in
3 this case other than you?

4 THE DEFENDANT: I understand very well, your Honor.

5 THE COURT: And, therefore, do you knowingly and
6 voluntarily waive your right to be represented by a lawyer who
7 has no potential or conflict with anyone else?

8 THE DEFENDANT: I will keep Dr. Oliva, your Honor.

9 THE COURT: No. The question is, do you knowingly and
10 voluntarily waive your right, and it's a right under the
11 Constitution, to be represented by some lawyer who has no
12 conflict whatsoever? It doesn't mean you have to choose him.
13 It means you waive your right to such a representation.

14 THE DEFENDANT: I waive, your Honor. I waive.

15 THE COURT: I need to know this because what I do not
16 wish to have is if the case turns out in a way that you did not
17 expect, I don't want you coming to apply to me and say, your
18 Honor, I didn't get a conflict-free representation. You can't
19 ask me that anymore because you're waiving it. Do you
20 understand?

21 THE DEFENDANT: I understand very well, your Honor.

22 THE COURT: And that applies not only to proceedings
23 in front of me, but also to any appeals and also to any
24 proceedings after judgment by which you seek review; do you
25 understand that? The waiver applies to all possibilities of

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1 proceedings coming out of this case. Do you understand?

2 THE DEFENDANT: I understand very well, your Honor.

3 THE COURT: Is there anything you wish me to explain
4 further?

5 THE DEFENDANT: No, your Honor. I'm satisfied.

6 THE COURT: I hold that Mr. Barerra-Barrera has made
7 an intelligent, voluntary and knowing choice to continue to be
8 represented by Mr. Oliva; that Mr. Barerra-Barrera has waived
9 his constitutional right to conflict-free representation; and
10 that he has done so after full consultation with Mr. Mack and
11 after questioning by me. Accordingly, I grant your wish to be
12 represented by Mr. Oliva. And, Mr. Oliva, you remain in the
13 case.

14 MR. OLIVA: Thank you, your Honor.

15 THE COURT: Mr. Mack, thank you very much for your
16 assistance.

17 MR. MACK: Thank you, your Honor.

18 THE COURT: Okay. You may be seated. Thank you,
19 Mr. Mack. You can hang around or you can --

20 THE DEFENDANT: Thank you, your Honor.

21 THE COURT: Mr. Naftalis, what's next?

22 MR. NAFTALIS: I may as well make the request now,
23 your Honor.

24 THE COURT: Say it slowly.

25 MR. NAFTALIS: Sorry. In the process of your colloquy

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1 with the defendant as to the potential conflicts with various
2 other cooperators, you made reference to the cooperator's
3 names. I would just ask that that portion of the transcript be
4 sealed because some of those cooperators are not -- they've not
5 publicly pled.

6 THE COURT: Without objection?

7 MR. OLIVA: No objection at all, your Honor.

8 THE COURT: Granted. We'll substitute in the
9 transcript A, B, C, D, E.

10 MR. NAFTALIS: Your Honor, I've just consulted with
11 Mr. Oliva right now. We don't have any dates on the calendar.
12 We are in the process of continuing our discussions, and
13 perhaps we could pick a date for sometime at the end of July to
14 come back and report to the Court.

15 THE COURT: How about a date in August?

16 MR. OLIVA: Yes, that would be even better.

17 THE COURT: August 8 -- Off the record.

18 (Discussion off the record)

19 THE COURT: Back on the record. August 8th at
20 11:00 a.m. A motion to exclude time?

21 MR. NAFTALIS: Yes, your Honor.

22 THE COURT: Without objection? Motion to exclude
23 time.

24 MR. OLIVA: No objection, your Honor.

25 THE COURT: So done. Thank you very much.

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1 MR. OLIVA: Thank you, Judge.

2 MR. NAFTALIS: Thank you, your Honor.

3 THE DEFENDANT: Thank you, your Honor.

4 (Adjourned)

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